Supreme Court, U.S.
FILED
DEC 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-769

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

VS.

BOB GEARY, *et al.*,
Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CEDRIC C. CHAO*
MONIQUE VAN YZERLOOY
GREGORY R. NEVINS
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104
Telephone: (415) 677-6000
**Counsel of Record.*

Counsel for Amici Curiae
CALIFORNIA DEMOCRATIC PARTY;
EDMUND G. BROWN, JR., Chair,
California Democratic Party;
CALIFORNIA LIBERTARIAN PARTY;
[Other Amici listed on inside
front cover]

BOWNE OF SAN FRANCISCO INC • 190 NINTH ST • S.F. CA 94103 • (415) 864 2300

CONTINUED LISTING OF AMICI

GAIL LIGHTFOOT, Chair, California Libertarian Party; SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; CAROLE MIGDEN, Chair, San Francisco County Democratic Central Committee; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; SAM HARPER, Chair, San Francisco County Republican Central Committee; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ROBERT FARRAN, Chair, Los Angeles County Democratic Central Committee; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; LIZ FIGUEROA, Chair, Alameda County Democratic Central Committee; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; STEPHEN STAMM, Chair, Santa Clara County Democratic Central Committee; MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE; DAVID STRAND, Former Chair, Marin County Democratic Central Committee; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; RON ARRANTS, Chair, Solano County Democratic Central Committee; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; THOMAS ROMERO, Chair, Placer County Democratic Central Committee; CAROL SHERMAN, Mayor of Fairfax, WENDY BAKER, Former Mayor of Fairfax; NANCY L. PARENT, Councilwoman and Former Mayor of Pittsburg; EDDIE SOUZA, Mayor of Santa Clara; LAWRENCE E. STONE, Councilman and Former Mayor of Sunnyvale; DENNIS ZANE, Councilman and Former Mayor of Santa Monica; LIBBY DENEBEIM, Chair of the San Francisco Board of Education; MARY KING, Member of the Alameda County Board of Supervisors; NATIONAL COMMITTEE FOR PARTY RENEWAL; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; PROFESSOR EDMOND COSTANTINI; and PROFESSOR EUGENE C. LEE.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF THE AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I.	
THIS COURT'S DECISION IN *EU* IS DISPOSITIVE OF THE ISSUE RAISED IN PETITIONERS' CERTIORARI PETITION	4
II.	
THE STATE CANNOT DEMONSTRATE A COMPELLING INTEREST SUFFICIENT TO JUSTIFY INFRINGEMENT OF THE POLITICAL PARTIES' FIRST AMENDMENT RIGHTS	6
A. The Desire to Prevent "Pressure" on Candidates Is Not A Legitimate, Much Less Compelling, Interest	7
B. The Guaranty Clause Does Not Permit California to Infringe the First Amendment Rights of Political Parties and Their Adherents	10
1. California's Interest Is Not "Compelling" Merely Because It Is Purportedly Acting Pursuant to a Constitutional Grant of Power	11
2. Actions Taken Pursuant to Constitutional Grants of Power Must Not Abridge Constitutional Freedoms	12
C. Petitioners' Reliance on *Letter Carriers* and *Austin* Is Misplaced	12
1. *Letter Carriers*	13
2. *Austin*	14

TABLE OF CONTENTS

Page

III.

SECTION 6(b) IS NOT NARROWLY TAILORED TO PROMOTE THE STATE'S ASSERTED INTEREST IN PRESERVING NONPARTISANSHIP 16

IV.

THE ASSERTED INTEREST IN JUDICIAL INDEPENDENCE DOES NOT JUSTIFY SECTION 6(b)'S SUPPRESSION OF SPEECH 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Page

Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) ..... *passim*

Baker v. Carr, 369 U.S. 186 (1962) 10

Buckley v. Valeo, 424 U.S. 1 (1976) 13

Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973) 12, 13, 14

Concerned Democrats of Florida v. Reno, 458 F. Supp. 60 (S.D. Fla. 1978) 19

Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) ..... *passim*

Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 14, 15

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) 8

Geary v. Renne, 880 F.2d 1062 (9th Cir. 1989), *reh'g granted*, 895 F.2d 1230 (1990) 4, 8, 17

Geary v. Renne, 911 F.2d 280 (9th Cir. 1990) .... *passim*

Kusper v. Pontikes, 414 U.S. 51 (1973) 16

Meyer v. Grant, 486 U.S. 414 (1988) 18

Reynolds v. Sims, 377 U.S. 533 (1964) 12

San Francisco Democratic Cent. Comm. v. Eu, 826 F.2d 814, 833 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989) 9

Tashjian v. Republican Party, 479 U.S. 208 (1986) 3, 8, 11

Texas v. White, 7 Wall. 700 (1869) 12

Statutes

United States Constitution:

Article. I, section 4 11

Article IV, section 4 10

First Amendment ..... *passim*

Fourteenth Amendment 12

TABLE OF AUTHORITIES

Statutes

	Page
United States Code:	
5 U.S.C. section 7324 (Hatch Act)	13, 14
California Constitution:	
Article II, section 6(b)	*passim*
California Elections Code:	
section 37	16
section 6401.5	16
section 10200.5	17
section 10207	17
section 10214	17

Other Authorities

D. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988) 12

L. Tribe, *American Constitutional Law*, 398 (2d ed. 1988) 12

No. 90-769

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

vs.

BOB GEARY, *et al.*,
Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTERESTS OF THE AMICI

The California Democratic Party and its chair, Edmund G. Brown, Jr.; the California Libertarian Party and its chair, Gail Lightfoot; the San Francisco, Los Angeles, Alameda, Santa Clara, Marin, Solano, and Placer County Democratic Central Committees, and the chairs of each of these county central committees and the former chair of the Marin County Democratic Central Committee; and the San Francisco County Republican Central Committee and its chair, Sam Harper, are interested in preserving and exercising the parties' First Amendment rights to endorse, support, or oppose candidates running for local nonpartisan offices.

Carol Sherman, Mayor of Fairfax, Wendy Baker, Councilwoman and former Mayor of Fairfax, Nancy L. Parent, Councilwoman and former Mayor of Pittsburg, Eddie Souza,

Mayor of Santa Clara, Lawrence E. Stone, Councilman and former Mayor of Sunnyvale, Dennis Zane, Councilman and former Mayor of Santa Monica, Mary King, member of the Alameda County Board of Supervisors, and Libby Denebeim, chair of the San Francisco Board of Education, are interested in having the right to seek and publicize the endorsements and support of political parties and in promoting responsive local government accountable to the electorate.

The National Committee for Party Renewal and the Northern California and Southern California Committees for Party Renewal are organizations composed of prominent political scientists and political practitioners interested in the rejuvenation of America's political parties. Professors Edmond Costantini and Eugene C. Lee are interested in maintaining the appropriate relationship between political parties and local government.

The Ninth Circuit Court of Appeals granted leave to Amici to file their brief in support of respondents' Petition for Rehearing and Suggestion for Rehearing En Banc and to participate in the oral argument before the *en banc* court.

SUMMARY OF ARGUMENT

This case concerns the straightforward issue of whether article II, section 6(b) of the California State Constitution infringes the First Amendment rights of California's political parties and their adherents by prohibiting those parties from endorsing, supporting, or opposing candidates for nonpartisan office. Just one year ago, this Court unanimously reaffirmed the profound constitutional significance of precisely this type of free expression in the political arena in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) ("*Eu*").

Supreme Court Rule 10 makes clear that petitions for writs of certiorari are appropriate only where certain "special and important reasons" arise necessitating this Court's ultimate decision. Here, where a recent and comprehensive decision of this Court struck down a ban on speech virtually identical to section 6(b), and where an *en banc* panel of the Ninth Circuit Court of Appeals

correctly applied that recent precedent, certiorari should be denied.

Endeavoring to distinguish this case from *Eu*, petitioners assert a "compelling" interest in preserving nonpartisanship as the basis for their request for certiorari, yet this interest — "legitimate" at best — is insufficient to justify the infringement of the identical First Amendment rights championed in *Eu*. Petitioners offer nothing more than speculation to support their argument that endorsements by political parties will ultimately lead to the demise of nonpartisanship. Where myriad cases of this Court exact a high standard of proof to justify infringement of free speech, petitioners' empty conjecture does not carry their burden.

Petitioners' invocation of the Guaranty Clause does not alter this analysis. As this Court has repeatedly observed, a state's interest is not perforce compelling merely because a state acts pursuant to a constitutional grant of power. *See Eu*, 489 U.S. at 222; *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986).

Petitioners' claim that section 6(b) is necessary to ensure a "fair and impartial" local government and judiciary is singularly unconvincing and unsupported in the record. Arguing, in effect, that the electorate must be protected from the endorsements of political parties, petitioners' argument reduces to the "paternalism" squarely rejected by this Court in *Eu*. Moreover, petitioners' asserted state "interest" does not apparently extend to the endorsements made by political clubs, political action committees, politicians, special interest groups, labor unions, newspapers and slate mailer vendors. As this Court recognized in *Eu*, however, "[t]here is no evidence that an endorsement issued by [a party] carries more weight than one issued by a newspaper or labor union." *Eu*, 489 U.S. at 228 n.18. Petitioners cannot overcome this gap in logic.

Finally, even if this Court were to accept petitioners' claim that their interest is compelling, section 6(b) is not the least restrictive means for achieving the end sought by petitioners. This Court has repeatedly recognized that

> [i]f the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only

> if the state shows that it advances a compelling state interest and *is narrowly tailored to serve that interest.*

Eu, 489 U.S. at 222 (emphasis added; citations omitted). As the Ninth Circuit correctly found, section 6(b) cannot pass this constitutional muster.

ARGUMENT

I.

THIS COURT'S DECISION IN *EU* IS DISPOSITIVE OF THE ISSUE RAISED IN PETITIONERS' CERTIORARI PETITION

Petitioners focus this Court's attention on California's asserted interest in preserving nonpartisanship as the justification for section 6(b)'s incursions on free speech. However, as Justice Canby observed in dissent from the original Ninth Circuit decision, "[t]he State's measure is directed at the *content of speech*, in order indirectly to achieve political consequences. That is its prime flaw." *Geary v. Renne*, 880 F.2d 1062, 1085 (9th Cir. 1989), *reh'g granted*, 895 F.2d 1230 (1990) (emphasis added). The keystone of this case is *not* nonpartisanship — which, after all, is merely one method for the selection of candidates[1] — but

[1] Petitioners' concept of "nonpartisanship" and what that concept embraces is unjustifiably expansive. As Justice Reinhardt pointed out, nonpartisanship signifies nothing more than that the candidates were not selected in primary elections by the political parties. *Geary v. Renne*, 911 F.2d 280, 287 (9th Cir. 1990) (*en banc*) (Reinhardt, J., concurring). "[T]he people of California may not suppress free speech on the excuse that they are merely determining *the method by which candidates will be elected.*" *Id.* (emphasis added). Thus, merely because a race is denoted nonpartisan, does not screen undue influence from any quarter nor bar party affiliation from playing a part. Indeed, one can run for *partisan* office in a nonpartisan manner, as do coalition candidates, and nonpartisan candidates may emphasize their party affiliation, as was Tom Bradley's practice in the Los Angeles mayoral race. *See id.* at 288. Petitioners do not suggest that nonpartisan candidates who so stress their partisanship should also have their speeches and advertisements censored.

rather, whether California's political parties and their adherents are entitled to the same freedom of speech in the political arena as all other entities and citizens. *See Geary*, 911 F.2d at 288 (Reinhardt, J., concurring). This Court has already emphatically resolved this question.

> We have recognized repeatedly that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." Indeed, the First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office.

Eu, 489 U.S. at 223 (citations omitted).

Section 6(b)'s draconian ban on endorsements in nonpartisan elections burdens parties' free speech rights as much as the "particularly egregious" ban on endorsements in primary elections did in *Eu*, a fact implicitly recognized by this Court in that decision. *Id.* at 224. "Free discussion about candidates for public office is no less critical before a primary than before a general election." *Id.* at 223. As the Ninth Circuit noted: "It is indisputable that the restrictions embodied in section 6(b) implicate appellees' First Amendment rights. The ban on endorsements directly affects political speech, 'the inviolability of which rests at the core of the First Amendment'." *Geary*, 911 F.2d at 283 (quoting *San Francisco Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 833 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989)).

In attempting to distinguish *Eu*, petitioners mistakenly argue that *Eu's* holding is restricted to partisan primary elections. In fact, *Eu's* rationale — that any law which interferes with a political party's ability to communicate with its members about a candidate's qualifications constitutes a "particularly egregious" burden on its freedoms of speech and association — applies with equal and undiminished force here. Prohibitions on endorsements "directly hamper[ ] the ability of a party to spread its message and hamstring[ ] voters seeking to inform themselves about the candidates and the campaign issues." *Eu*, 489 U.S. at 223. The Ninth Circuit correctly rejected petitioners' limitation, holding

that the broad principles articulated in *Eu* applied to political speech in *all* elections:

> [T]here is nothing in this court's *Eu* opinion or the Supreme Court's affirmance of that opinion which suggests that either analysis was in any way dependent upon the fact that partisan offices were at issue. The concern in both fora was with the State's abridgement of the rights of political parties and their members to exchange ideas and information, not with the nature of the elections at issue.

Geary, 911 F.2d at 284.

Similarly, petitioners' efforts to restrict the foundation for the *Eu* decision to this Court's observation that parties have the right to "communicate with its members concerning *[their] own decision-making process*" (*see* Petitioners' Brf. at 11; emphasis in original) cannot be credited. *Eu* clearly spoke to the central importance of political speech to the guarantees of the First Amendment and rested its holding thereon. *Eu*, 489 U.S. at 222-23 ("The ban directly affects speech which is at the core of our electoral process and of the First Amendment freedoms") (citation omitted).

Despite petitioners' attempts to find limiting distinctions in *Eu*, the fact remains that this Court's very recent First Amendment analysis in *Eu* governs this case. Section 6(b) clearly offends the same settled constitutional principles transgressed in *Eu*, thus obviating the need for further review by this Court.

II.

THE STATE CANNOT DEMONSTRATE A COMPELLING INTEREST SUFFICIENT TO JUSTIFY INFRINGEMENT OF THE POLITICAL PARTIES' FIRST AMENDMENT RIGHTS

Petitioners advance several arguments to support their claim that the state's interest in nonpartisanship reaches the requisite compelling interest standard sufficient to override the political parties' First Amendment rights. As the Ninth Circuit correctly held, none of petitioners' arguments has merit. *See Geary*, 911

F.2d at 283-86. California "has no compelling interest in limiting the people's right to make informed choices or to select candidates for office on whatever basis they deem relevant." *Id.* at 288 (Reinhardt, J., concurring).

A. The Desire to Prevent "Pressure" on Candidates Is Not A Legitimate, Much Less Compelling, Interest

Petitioners assert that party endorsements will lead to "pressure" on candidates to "tailor their views and decisions on important issues to the party line," which, in turn, will undermine the impartial administration of the laws (Petitioners' Brf. at 8, 10). As the Ninth Circuit held, however, the record is devoid of support for this contention:

> We therefore reject appellants' assertion that allowing party endorsements will lead inexorably to party usurpation of the nomination process for nonpartisan candidates; the seventy years of nonpartisan government celebrated by appellants were achieved without benefit of a formal ban on partisan advocacy, and the *State has offered nothing but speculative evidence to support its contention that the invalidation of § 6(b) will generate a disastrous departure from the experience of the past.*

Geary, 911 F.2d at 285-86 (emphasis added). The concurring opinion, in even stronger language, also remarked on this absence of supporting evidence:

> I note that nowhere in the record is there a whit of evidence that party endorsements in nonpartisan elections ever, even on a single occasion, led to corruption or evil of any kind — almost eighty years of endorsements in nonpartisan races and not one example of a public official being unduly or improperly influenced.

Id. at 289 (Reinhardt, J., concurring).[2]

[2] Indeed, the history of nonpartisanship in California supports *respondents'* and *Amici's* position that the goal of nonpartisanship in local California politics can be achieved *without* section 6(b).

Equally important, the mere fact that nonpartisan officeholders in the future might listen to the views of political party organizations *does not* signal either imminent corruption or an undermining of fair and impartial government. Officeholders are supposed to be responsive to the views of all voters, including the voters who organize themselves in party organizations. As the Ninth Circuit noted:

> Even if California is correct, and the availability of partisan endorsements *in the future* does produce nonpartisan officeholders more sensitized to party preferences, that result will have been effected through the exercise of informed voter choice — a mechanism with which the State may not interfere out of a concern that, in the absence of regulation, the voters will misperceive their own best interests.

Geary, 911 F.2d at 286 n.5 (emphasis in original) (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791 n.31 (1978)).

Petitioners further argue for a suppression of speech due to the possibility that voters will perceive that some candidates are "beholden" to political parties. *See* Petitioners' Brf. at 9. However, there is no evidence that the public's knowledge that certain candidates have been endorsed — by any source — necessarily translates to a perception that those individuals are "beholden" to the endorser. In essence, petitioners argue that information should be *kept from* voters due to the effect it will have on the voters; this position directly conflicts with both the First Amendment and this Court's holdings. Indeed, this Court has deemed this " 'highly paternalistic approach' limiting what people may hear [] generally suspect, [finding it] particularly egregious where the State censors the political speech a political party shares with its members" (*Eu*, 489 U.S. at 223-24 (citations omitted)) and has repeatedly pronounced its "faith in the ability of individual voters to inform themselves about campaign issues." *Tashjian*, 479 U.S. at 220. *See also Geary*, 880 F.2d at 1085-86 (Canby, J., dissenting) (Section 6(b) "permits California to suppress political expression because the voters might misuse the information. Our entire First Amendment jurisprudence is to the contrary"). *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) makes clear that, in a

democracy, it is up to the *voter* to determine what weight to give endorsements:

> The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.

Id. at 791-92.

Finally, petitioners' prediction of the dangers inherent in the alleged *quid pro quo* of the endorsement process suffers from a fatal illogic. Countless political clubs, political action committees, special interest and pressure groups, politicians, labor unions, newspapers and for-profit state mailer vendors[3] are free to endorse under section 6(b). Many of these entities, as well as individual politicians, are able to raise far more funds than the official political parties, which the Ninth Circuit has described as "weak and fossilized." *San Francisco Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 833 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989).[4] It makes no sense to suppress the speech of political parties — which have a more diverse membership and which are more accountable than the other groups listed above — while simulta-

[3] The prevalence of paid-for "pseudo-official mailers" (*Geary*, 911 F.2d at 293) which invoke political party labels serves only to confuse a public seeking party guidance.

> Many of these private slate mailers, despite small print disclaimers, use the name of a political party and appear to the average voter to contain official party endorsements. If political parties were to be prohibited from making endorsements in . . . campaigns, then . . . candidates who might otherwise seek an honest endorsement for a legitimate political party might be compelled to buy spurious party endorsements — to pay thousands of dollars to be included on slate mailers sent out by private operators who may have no convictions about anything.

Id. at 294 (Reinhardt, J., concurring) (footnote omitted); *see also Eu*, 489 U.S. at 228 n.18.

[4] Even were parties as influential as petitioners paint them, "speech cannot be prohibited on the ground that it is effective." *Geary*, 911 F.2d at 289 (Reinhardt, J., concurring).

neously permitting all other entities and individuals to endorse candidates in nonpartisan elections.

> The fact is that suppressing the views of political parties leaves the field free to special interest groups that have narrow, often single-issue agendas they wish to advance through the courts. California's endorsement ban permits those groups to promote their chosen candidates without fear of countervailing messages from broader-based political parties which tend to take a more balanced view, and which consider candidates' overall records, qualifications, and . . . philosophy.

Geary, 911 F.2d at 292-93 (Reinhardt, J., concurring).

B. The Guaranty Clause Does Not Permit California to Infringe the First Amendment Rights of Political Parties and Their Adherents

As further support for their contention that California may silence political party endorsements in nonpartisan races, petitioners rely on the U.S. Constitution's guarantee of a republican form of government (the "Guaranty Clause"). Petitioners assert that because California's interest in structuring state government is recognized in the U.S. Constitution, it is *per se* compelling (Petitioners' Brf. at 6-7). Petitioners' argument is doubly flawed: *first*, a state's interest is not "compelling" in the First Amendment context merely because the state acts under an express constitutional grant of power; and *second*, actions taken pursuant to constitutional grants of power cannot abridge fundamental First Amendment rights.[5]

---

[5] Petitioners' argument is further undermined because it is unclear whether the Guaranty Clause grants *any* powers to the states. It has long been held that it is *Congress'* province to enforce the guarantee of a republican government. *See, e.g., Baker v. Carr*, 369 U.S. 186, 220 (1962). Petitioners' brief notably lacks any citation to case law in which a state's enactment has been upheld pursuant to the Guaranty Clause.

Moreover, the Guaranty Clause does not empower a state to establish whatever type of government it chooses; it guarantees only a "republican form of government." U.S. Const. art. IV, § 4. It is, therefore, erroneous to suggest that every state decision regarding government structure, such as partisan versus nonpartisan, automatically receives the protection of the Guaranty Clause. Indeed, the full text of the Guaranty Clause belies such an expansive reading and indicates that Congress merely guarantees that the states will be protected from insurrection and invasion, and will be assured a basic form of government in accordance with fundamental republican principles. *See id.*

1. California's Interest Is Not "Compelling" Merely Because It Is Purportedly Acting Pursuant to a Constitutional Grant of Power

Petitioners rely heavily on Justice Rymer's dissent from the *en banc* decision for the proposition that "the constitutional origin of California's interest in the nonpartisan structure of local government renders that interest compelling *per se*" (Petitioners' Brf. at 6-7). Petitioners are mistaken.

A state's interest is not compelling merely because the state acts pursuant to an explicit constitutional grant of power. *See Eu*, 489 U.S. at 222; *Tashjian*, 479 U.S. at 217. In *Eu* and *Tashjian*, this Court recognized that the statutes at issue in those cases were enacted pursuant to an explicit constitutional grant of power, *i.e.*, the right to regulate the time, place, and manner of elections. U.S. Const. art. I, § 4. However, this Court did not end its inquiry there and automatically term the states' interest "compelling." In *Tashjian*, this Court declared that a reviewing court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Tashjian*, 479 U.S. at 214. After evaluating Connecticut's interests, this Court termed them "insubstantial." *Id.* at 225. Similarly, in *Eu*, this Court held that California's "ban on primary endorsements by political parties burdens political speech while serving no compelling governmental interest." *Eu*, 489 U.S. at 229.

Significantly, both *Eu* and *Tashjian* recognized the difference between a state's *power* to act and a state's *interest* in taking action. Each opinion recognized that the state had a fundamental power to regulate elections; however, this power was not immune from a First Amendment challenge. In each opinion, this Court inquired whether the state was acting to achieve a compelling

state interest. Here, simply attaching the label "per se compelling" does not carry petitioners' burden of affirmatively presenting a compelling justification for section 6(b).

2. Actions Taken Pursuant to Constitutional Grants of Power Must Not Abridge Constitutional Freedoms

This Court has flatly rejected the notion that the Guaranty Clause justifies otherwise unconstitutional actions. *See Reynolds v. Sims*, 377 U.S. 533, 582 (1964) (In striking down Alabama apportionment, Court held that Congress, even acting under the Guaranty Clause, "simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights"); *Texas v. White*, 7 Wall. 700, 729 (1869) ("In the exercise of the power conferred by the guaranty clause, . . . [i]t is essential . . . that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution").

Even commentators who ascribe an expansive meaning to the Guaranty Clause recognize that under no reading could the Clause entitle a state to abridge fundamental constitutional freedoms:

> [T]he guarantee clause does not give the states carte blanche to order their government systems. Other constitutional provisions impose a variety of restrictions on a state's freedom to structure its governmental processes.

D. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 44 (1988); *see also* L. Tribe, *American Constitutional Law* 398 (2d ed. 1988) (assuming that a state can invoke the Guaranty Clause, a state's structural choices are still constrained by the constitutional limitations applicable to states by the Fourteenth Amendment).

C. Petitioners' Reliance on *Letter Carriers* and *Austin* Is Misplaced

Petitioners rely heavily on two cases, *Civil Service Comm'n v. Letter Carriers* ("*Letter Carriers*"), 413 U.S. 548 (1973) and *Austin v. Michigan Chamber of Commerce* ("*Austin*"), 110 S. Ct. 1391 (1990), to support their argument that banning the political speech of California's political parties is both compelling and justified. Neither case is apposite.

1. *Letter Carriers*

Petitioners argue that *Letter Carriers* recognized an interest in impartial government as compelling, that section 6(b) serves that same interest, and that therefore section 6(b) should be upheld because it advances that interest. *See* Petitioners' Brf. at 8-11. Petitioners' syllogism is fatally flawed, however, in that this Court has specifically *rejected* the argument that an interest in impartial government justifies a ban on endorsements in partisan elections. *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*).

In *Buckley*, the government argued that *Letter Carriers* supported a federal restriction on independent campaign expenditures during candidate elections. This Court termed the government's reliance on *Letter Carriers* "mistaken[]", holding that *Letter Carriers* specifically preserved the right of persons to express their opinions publicly during candidate elections:

> In upholding the Hatch Act's broad restrictions on the associational freedoms of federal employees, the [*Letter Carriers*] Court *repeatedly emphasized* the statutory provision and corresponding regulation permitting an employee to "'*[e]xpress his opinion* as an individual privately *and publicly* on political subjects and *candidates*.'" [The Court] carefully declined to endorse provisions threatening political expression. The Court did not rule on the constitutional questions presented by the regulations forbidding *partisan campaign endorsements* through the media and speechmaking to political gatherings . . . .

Buckley, 424 U.S. at 48 n.54 (emphasis added) (citations omitted).[6]

In effect, petitioners misread the governmental interests at stake in *Letter Carriers* as having a broader application than that

---

[6] This section of *Buckley* was joined by seven of the eight justices who took part in the decision.

which this Court enunciated therein. Thus, while this Court recognized the impartial administration of government as a compelling interest justifying the restrictions of the Hatch Act, it did so in the limited context of federal government employees, explicitly distinguishing this class from the general public:

> [T]he government has an interest in regulating the conduct and "the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general."

Letter Carriers, 413 U.S. at 564 (citation omitted).

Petitioners' reliance on *Letter Carriers* ignores this obvious and crucial distinction between elected office and civil service. In enacting the Hatch Act, Congress was reacting to the unique threat that a government employee's job security and potential for advancement would depend on her currying favor with establishment politicians. *Letter Carriers*, 413 U.S. at 566. The voters would have no say in any improper promotion or firing and virtually no recourse to protest such subversion of the merit system. By contrast, the people of California have an obvious recourse against any candidate whom they perceive to be improperly beholden to a political party — they can vote against her.

2. Austin

Petitioners' attempt to save section 6(b) by resort to this Court's decision in *Austin* reflects a basic misunderstanding of the state interest involved in that case. Contrary to petitioners' reading, the *Austin* Court was concerned not with *political* organizations such as the California Democratic and Libertarian Parties or Massachusetts Citizens for Life but, rather, with the excessive political influence of *commercial* organizations, such as the Michigan Chamber of Commerce. *See Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*") (Court struck down state law regulating expenditures of some corporations, despite recognizing advantages gained through the corporate form).

MCFL and *Austin* both teach that when a commercial organization, through largesse, gains power unrelated to its political popularity, there is a potential for corruption.[7] Endeavoring to bootstrap political parties to fit within the reasoning of *Austin*, petitioners awkwardly equate statutory benefits with the financial power addressed in that case. Contrary to petitioners' argument, however, the mere presence of state-conferred advantages does not, without more, trigger a corruption concern. *See MCFL*, 479 U.S. at 259-63.

In fact, political parties *do not* give rise to the corruption concern of *Austin* precisely because their political power derives directly from their *political* popularity. A *political* organization does not unfairly exploit its influence when it exercises political power, even if that power derives from state-conferred advantages:

> "[Certain groups] do not pose [any] danger of *corruption*. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *That description applies equally well to the political parties targeted by § 6(b).*

Geary, 911 F.2d at 284 (emphasis added) (quoting with emphasis added, *MCFL*, 479 U.S. at 259).

In direct conflict with this express holding, and with no citation to authority or the record, petitioners contend that "state statutes provide ballot-qualified political parties with resources and advantages which are not simply a function of the parties' popularity in the political marketplace" (Petitioners' Brf. at 14 n.6). Petitioners would thus have this Court believe that the influence of the

---

[7] Justice Reinhardt made a similar observation:

> In the case at hand, it does not take much wisdom to know that, whatever the cause of the problems in municipal government in the early 1900s, today's threat to the integrity of the political process comes not from the Republican or Democratic parties — or even from the Libertarians — *but rather from the corrupting influence of money in politics* — that is, from massive political contributions.

Geary, 911 F.2d at 287 (Reinhardt, J., concurring) (emphasis added).

California Democratic Party and the influence of the California Peace and Freedom Party, for example, are due not to their respective political popularity, but to the fact that California law provides them with "advantages." However, because all ballot-qualified parties receive similar statutory "advantages," and because the California Democratic and Peace and Freedom Parties have grossly disparate influence, petitioners' argument is demonstrably wrong.[8]

III.

SECTION 6(b) IS NOT NARROWLY TAILORED TO PROMOTE THE STATE'S ASSERTED INTEREST IN PRESERVING NONPARTISANSHIP

Because section 6(b) affects political expression and participation, it must be narrowly drawn to avoid unnecessary restrictions of constitutionally protected freedoms. *Eu*, 489 U.S. at 221-22; *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* (citation omitted). Even if this Court accepts, *arguendo*, petitioners' interest as "compelling," section 6(b) is not the least restrictive means for preserving nonpartisanship.

Indeed, the Ninth Circuit detailed at length the several provisions of the California Elections Code designed to safeguard the nonpartisan character of local and judicial elections. *Geary*, 911 F.2d at 285 n.4, *citing* Cal. Elec. Code § 37 (forbidding party participation in nomination of candidates for nonpartisan office); Cal. Elec. Code § 6401.5 (forbidding references to party affiliations in declarations of candidacy and nominations papers); Cal. Elec. Code § 10200.5 (forbidding name of party of which candidate belongs from appearing on ballot); Cal. Elec. Code § 10214 (permitting voter to cast ballot for candidate for nonpartisan office without regard to party affiliation); Cal. Elec. Code § 10207 (requiring partisan and nonpartisan offices to be listed in separate columns on ballot form). In discussing section 6(b)'s application to the judiciary, Justice Reinhardt offered still more options falling short of suppressing speech. *Geary*, 911 F.2d at 294-95.

Petitioners made no showing below, apart from discredited speculation, that the asserted state interest in preserving the nonpartisan structure of government could not be served by these various statutory provisions without resort to the total foreclosure of political speech mandated by section 6(b). Petitioners' brief does not remedy this absence of proof and speaks only in conclusory terms. In the face of these alternative measures and with literally no support for their contention that section 6(b) is the only effective method for preservation of nonpartisanship, petitioners' argument must be rejected.

IV.

THE ASSERTED INTEREST IN JUDICIAL INDEPENDENCE DOES NOT JUSTIFY SECTION 6(b)'S SUPPRESSION OF SPEECH

As Justice Canby observed in his dissent to the original Ninth Circuit opinion, by choosing to subject its judges to election, California has necessarily injected politics into the judiciary. *Geary*, 880 F.2d at 1085 (Canby, J., dissenting). Having done so, it does not make sense to permit special interest groups, political action committees, Democratic and Republican clubs, and the like to endorse or oppose judges, yet simultaneously prohibit political parties from participation. As Justice Canby noted,

> The political threat to judicial independence, is attributable . . . far more to the decision to elect judges in the first place, and to subject them to reelection, than it is to party endorsement.

Id.

---

[8] Justice Kennedy termed the statute at issue in *Austin* "the most severe restriction on political speech ever sanctioned by this Court" (*Austin*, 110 S.Ct. at 1425-26 (Kennedy, J., dissenting)); yet the *Austin* statute placed no restrictions on the right to endorse and even allowed *for-profit nonpolitical* corporations to make expenditures, if channeled through segregated funds. In contrast, section 6(b) prohibits endorsement, support, and opposition of candidates by political parties, thus constituting a far greater burden on First Amendment rights than did the *Austin* statute.

A state, after making the voluntary choice to have certain offices elected, cannot attempt to suppress political speech in the interest of keeping those elections pristine. *Meyer v. Grant*, 486 U.S. 414 (1988). In *Meyer*, this Court struck down Colorado's ban on paying persons to circulate initiative petitions. Colorado had voluntarily created the initiative process and, in enacting the ban, wanted to preserve the integrity of that process by preventing fraud or undue influence on the voters. *Id.* at 419, 424. This Court unanimously declared Colorado's interest insufficient to justify the burden on speech in an area where "the importance of First Amendment protections is 'at its zenith.'" *Id.* at 425 (citation omitted).

In arguing for the specific need to keep judges above the political fray, petitioners cannot reconcile why the judiciary can remain immune from private interest pressure on its own, but must be actively protected from the speech of political parties. Justice Reinhardt recognized the internal inconsistency of such a position:

> [I]t cannot be seriously argued . . . *both* that the typical judge is strong enough to ignore the temptation to succumb to the influence of those who can truly control his destiny — the powerful interests, the big contributors, even the governor who has it solely within his power to make a career advancement possible — *and* at the same time, that the typical judge is so weak, morally or ethically, that he will not be willing to disagree in subsequent judicial opinions with so much as a single plank of the platform of a political party that has given him nothing more than its endorsement. That argument simply does not make sense.

Geary, 911 F.2d at 291 (emphasis in original; footnote omitted).

It is plainly illogical to argue that the cash-rich special interest groups which were so visible during California's 1986 judicial retention election do not undermine the independence of the judiciary while the endorsements of California's political parties most certainly will. As Justice Reinhardt observed:

> Given that many of the arguments befouling today's judicial campaigns are harmful to the health of the state judiciary, there is little reason to single out political endorsements, which are surely a cut above much that currently passes for "debate on public issues [that is] uninhibited, robust, and wide-open."

Geary, 911 F.2d at 293 (citation omitted); *see generally id.*, 911 F.2d at 291-94 (Reinhardt, J., concurring) (discussion of endorsements by a wide variety of special interest groups in California Supreme Court judicial retention election).

The statute at issue in *Concerned Democrats of Florida v. Reno*, 458 F. Supp. 60 (S.D. Fla. 1978), cited by petitioners, specifically addressed the issue of endorsements in judicial elections. In striking down that statute, the court enumerated several less restrictive alternatives to banning this type of speech, among which was the court's observation that judicial offices were nonpartisan by law, as in California. *See id.* at 65.[8] As that court stated, an interest in preserving judicial independence does "not fit tightly enough" with the sweeping suppression of political speech (*id.*) imposed by section 6(b).

Petitioners simply have no logical argument which addresses why political party endorsements will sully judicial integrity while private interest endorsements will allow judicial candidates to remain untainted. Thus, as Justice Reinhardt accurately observed,

> While it is undoubtedly clear to all that California could not prohibit *all* endorsements in judicial elections, in this case it

---

[8] Petitioners' citation to *Concerned Democrats* (Petitioners' Brf. at 6 n.3) incorrectly implies that the court in that case found Florida's statute prohibiting political parties from "endorsing, supporting or assisting candidates in judicial campaigns" (*id.*) violative of the First Amendment due to the statute's overbreadth. In fact, that court found that less restrictive alternatives were available, thus invalidating the statute on that basis. *Concerned Democrats*, 458 F. Supp. at 65. Moreover, petitioners incorrectly imply that the *Concerned Democrats* court differentiated between parties and partisan organizations in making their ruling. To the contrary, the court there was concerned with speech restrictions on groups generally and struck down the statute because "[Florida] cannot also control private citizens who wish to make their choices known." *Id.*

> is equally clear that it cannot single out one form of disfavored speech and ban it.

Geary, 911 F.2d at 294 (emphasis in original). Section 6(b)'s muzzle on political parties does nothing to advance petitioners' interest in an independent judiciary and does far too much in trespassing upon the parties' guaranteed freedom of speech under the First Amendment.

CONCLUSION

As in *Eu*, "California . . . never adequately explains how banning parties from endorsing or opposing . . . candidates [for nonpartisan office] advances [its asserted] interest." *Eu*, 489 U.S. at 226. Absent this nexus, section 6(b) must fail. For this reason and the reasons set forth above, Amici respectfully request that the petition for writ of certiorari be denied.

Dated: December 15, 1990

Respectfully submitted,

CEDRIC C. CHAO
MONIQUE VAN YZERLOOY
GREGORY R. NEVINS
MORRISON & FOERSTER

By _____
Cedric C. Chao
Counsel of Record
Attorneys for Amici Curiae